

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EARL RODGERS,

Defendant-Appellant.

UNPUBLISHED

January 30, 2007

No. 263946

Wayne Circuit Court

LC No. 04-009785-01

Before: Donofrio, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for first-degree murder, MCL 750.316, carjacking, MCL 750.529a, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to life imprisonment without parole for the first-degree murder conviction,¹ parolable life terms for the carjacking and armed robbery convictions, and a consecutive two-year term of imprisonment for the felony-firearm conviction. Because the police were not required to electronically record defendant's statement, the trial court did not abuse its discretion in admitting a photograph of the victim, the trial court did not err in instructing the jury, and defendant's trial counsel was not ineffective, we affirm.

Defendant's convictions arise from the shooting death of Robert Reynolds during an armed robbery and carjacking in a church parking lot in Detroit. The prosecution presented evidence that defendant gave a statement to the police in which he admitted shooting Reynolds. Defendant presented an alibi defense, denied giving the statement that the prosecution offered against him, and claimed the statement was fabricated.

Defendant first argues that the police violated his constitutional right to due process when the police failed to make an audio or visual recording of his police interview. Because defendant did not object to the admission of his statement on this ground below, this issue is not

¹ The jury found defendant guilty under alternative theories of first-degree premeditated murder and first-degree felony murder. At sentencing, the trial court merged those convictions and sentenced defendant to a single term of life imprisonment.

preserved. Therefore, we review the issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999).

Defendant does not cite any federal authority recognizing a requirement that custodial statements be electronically recorded as an element of due process under the federal constitution. Although some states have recognized such a requirement under their respective state constitutions, see, e.g., *Stephan v State*, 711 P2d 1156 (Alas, 1985), this Court has squarely held that the Due Process Clause of the Michigan Constitution, Const 1963, art 1, § 17, does not require audio or visual recordings of custodial interrogations. *People v Geno*, 261 Mich App 624, 627-628; 683 NW2d 687 (2004); *People v Fike*, 228 Mich App 178, 183-186; 577 NW2d 903 (1998). Accordingly, defendant has not established a plain error on this basis.

Next, defendant argues that the trial court erred by admitting a photograph depicting the victim while still alive. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). Defendant argues that the photograph was not relevant under MRE 401 and, even if relevant, that its probative value was substantially outweighed by the danger of unfair prejudice under MRE 403. Under the rules of evidence, relevant evidence is admissible. MRE 402; *People v Campbell*, 236 Mich App 490, 503; 601 NW2d 114 (1999). Evidence is relevant if it tends to make the existence of a fact at issue more or less probable than it would be without the evidence. MRE 401; *Campbell*, *supra*. Under MRE 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *People v Sabin (After Remand)*, 463 Mich 43, 57-58; 614 NW2d 888 (2000). Unfair prejudice does not mean any prejudice, but refers to "the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *People v Pickens*, 446 Mich 298, 337; 521 NW2d 797 (1994), quoting *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984). See also *People v Vasher*, 449 Mich 494, 501-502; 537 NW2d 168 (1995).

Defendant claimed in his statement that the victim grabbed him, swung him around, and pulled a gun out on him first. The trial court did not abuse its discretion in determining that the photograph was relevant to assist the jury in deciding whether the victim may have been the aggressor and initiated a struggle with defendant. Further, defendant has not established that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice.

Defendant also argues that the trial court erroneously instructed the jury on flight. Because defendant did not object to the trial court's flight instruction at trial, we review this issue for plain error affecting defendant's substantial rights. *Carines*, *supra*. Evidence of flight is generally admissible, although it is insufficient by itself to sustain a conviction. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). A defendant's flight may be evidence of the defendant's consciousness of guilt, but can also be consistent with innocence, such as acting out of fear. *Id.*; *People v Taylor*, 195 Mich App 57, 63; 489 NW2d 99 (1992). It is for the jury to decide what caused the defendant to flee. *Id.*

Contrary to defendant's argument, evidence of flight can include leaving the scene of a crime. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). In this case, defendant gave a statement to the police in which he suggested that he shot the victim in self-defense, after the victim first assaulted defendant and produced a gun. The evidence showed that

defendant subsequently left the scene. These facts support the trial court's flight instruction, which appropriately informed the jury that it was to decide whether the evidence, if true, showed that defendant left the scene because of a consciousness of guilt, or for innocent reasons, such as panic, mistake, or fear. There was no plain error in instructing the jury on flight.

Finally, defendant argues that trial counsel was ineffective for not objecting to the admission of his police statement on the ground that it was not electronically recorded, and for failing to object to the jury instruction on flight. Because defendant did not raise this issue in an appropriate motion in the trial court, our review is limited to errors apparent from the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

In light of our conclusion that the police were not required to electronically record defendant's custodial statement as a matter of law, counsel was not ineffective for failing to object to the admission of defendant's statement on this ground. Similarly, the trial court's flight instruction was supported by the evidence and, therefore, any objection would have been futile. Thus, trial counsel was not ineffective. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Because this issue can be decided on the existing record, remand for an evidentiary hearing is not warranted.

Affirmed.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Brian K. Zahra